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Effects of armed conflicts on treaties

Comments and observations received from international organizations

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I. Introduction

1. At its fifty-ninth session, the International Law Commission requested the Secretariat to circulate a note to international organizations requesting information about their practice with regard to the effects of armed conflicts on treaties involving them.[1] Pursuant to that request, a letter was transmitted to selected international organizations bringing to their attention the fact that the Working Group of the International Law Commission on the effects of armed conflicts on treaties had, in 2007, recommended that the question of the inclusion (within the scope of the topic) of treaties involving intergovernmental organizations be left in abeyance until a later stage of the Commission's work on the overall topic (see A/CN.4/L.718, para. 4). The organizations were invited to submit their comments and observations, including information on their respective practice, regarding the effects of armed conflicts on treaties involving them.

2. As at 15 February 2008, communications had been received from the following four international organizations (dates of submission in parentheses): European Bank for Reconstruction and Development (10 January 2008); European Commission (6 February 2008); International Atomic Energy Agency (26 November 2007); International Maritime Organization (9 January 2008). While the European Bank for Reconstruction and Development and the International Atomic Energy Agency indicated that they had no comments, the written submissions of the European Commission[2] and the International Maritime Organization are reproduced in section II below.

II. Comments and observations received from international organizations

A. European Commission[3]

1. The effect of armed conflict on the Treaty establishing the European Community

Under article 297 of the Treaty establishing the European Community, the member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious

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[1] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 272.

[2] The European Commission further forwarded to the International Law Commission a study commissioned in 1985, entitled "Protection of the environment in times of armed conflict", which, inter alia, considered the applicability of environmental treaties during armed conflict. In doing so, the European Commission noted that while the study did not embody its official view, it was nonetheless helpful for the work of the International Law Commission. A copy of the study is available on the website maintained by the Secretariat for the International Law Commission, located at www.un.org/law/ilc/.

[3] The present submission has been reproduced as received. The designations employed and the presentation of the material in this submission do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security. If such national measures have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the rules laid down in the Treaty (article 298 (1)). If the Commission considers that a member State is making improper use of the powers provided in article 297, it may bring the matter directly before the Court of Justice (article 298 (2)).

Absent an armed conflict between the member States since the foundation of the Community, these provisions only played a practical role so far when an armed conflict occurred outside the territories where the Treaty is applicable as such. In the Falkland war between the United Kingdom and Argentina, article 297 of the Treaty served as a legal basis for the United Kingdom to maintain stricter sanctions towards Argentina than those decided by the Community itself.[4] Article 297 was also invoked by Greece to justify its trade embargo against the former Yugoslav Republic of Macedonia in the early 1990s. Since the European Commission did not accept that the name dispute between the two countries fell within the scope of article 297, the European Court of Justice was seized under article 298. The latter did not take provisional measures.[5] After a resolution of the dispute in September 1995, Greece abolished the embargo and the case before the Court was discontinued.

2. The effect of armed conflict on treaties to which the European Community is a party

Questions on the effect of armed conflict on treaties to which the European Community is a party occur occasionally in practice. [Reference may be made to the practice of the European Commission] with respect to the conflict in the former Yugoslavia in 1991 and with respect to certain other conflicts.

(a) The conflict in the former Yugoslavia

In 1980, the European Economic Community and its member States concluded a Cooperation Agreement with the Socialist Federal Republic of Yugoslavia. The Council of the European Community approved that agreement by adopting regulation No. 314/83 of 24 January 1983.[6]

On 11 November 1991, the Council and the representatives of the Governments of the member States, meeting within the Council, suspended the application of the Cooperation Agreement.[7] As laid down in its preamble, the decision was motivated by several factors. First, the European Community and its member States took note of the crisis in Yugoslavia and the concern expressed by the Security Council, in resolution 713 (1991), that the prolongation of the situation constituted a threat to international peace and security. Second, it was considered that the pursuit of hostilities and their consequences on economic and trade relations

[4] J. Kokott, commentary on article 297 of the Treaty establishing the European Community, in R. Streinz (ed.), *EUV/EGV*, Munich: C. H. Beck, 2003, p. 2455.

[5] European Court of Justice, Case C-120/94 R, [1994] ECR 1-3037, *Commission v. Hellenic Republic*.

[6] *Official Journal* 1983, L41, p. 1.

[7] *Official Journal* 1991, L315, p. 47.

constituted a radical change in the conditions under which the Cooperation Agreement was concluded; these consequences would call into question the application of the Agreement. Third, it was noted that the appeal launched by the European Community and its member States on 6 October 1991 calling for compliance with the ceasefire agreement of 4 October 1991 had not been heeded. Fourth, the European Community and its member States had announced on 6 October 1991 their decision to terminate the Cooperation Agreement, should the agreement of 4 October 1991 reached between the parties to the conflict not be observed. Transposing the decision into Community law, the Council adopted regulation No. 3300/91 suspending the trade concessions provided for by the Cooperation Agreement.[8]

As suspension of the application of the Agreement had direct consequences for private importers of goods from the Socialist Federal Republic of Yugoslavia to the European Community, a German court referred several preliminary questions to the European Court of Justice. In its judgment of 16 June 1998, the Court affirmed the validity of Council regulation 3300/91.[9] Holding that customary international law forms part of Community law, it scrutinized whether the Community legislator had conformed itself with the fundamental principle of *pacta sunt servanda* under article 26 of the Vienna Convention on the Law of Treaties. In that context, the Court made the following observations:

> "53. For it to be possible to contemplate the termination or suspension of an agreement by reason of a fundamental change of circumstances, customary international law, as codified in article 62(1) of the Vienna Convention, lays down two conditions. First, the existence of those circumstances must have constituted an essential basis of the consent of the parties to be bound by the treaty; secondly, that change must have had the effect of radically transforming the extent of the obligations still to be performed under the treaty.
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> "54. Concerning the first condition, the preamble to the Cooperation Agreement states that the contracting parties are resolved 'to promote the development and diversification of economic, financial and trade cooperation in order to foster a better balance and an improvement in the structure of their trade and expand its volume and to improve the welfare of their populations' and that they are conscious 'of the need to take into account the significance of the new situation created by the enlargement of the Community for the organization of more harmonious economic and trade relations between the Community and the Socialist Federal Republic of Yugoslavia'. Pursuant to those considerations, article 1 of the Agreement provides that its object 'is to promote overall cooperation between the contracting parties with a view to contributing to the economic and social development of the Socialist Federal Republic of Yugoslavia and helping to strengthen relations between the parties'.
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> "55. In view of such a wide-ranging objective, the maintenance of a situation of peace in Yugoslavia, indispensable for neighbourly relations, and the existence of institutions capable of ensuring implementation of the cooperation

[8] Council regulation No. 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, *Official Journal* 1991, L315, p. 1.

[9] European Court of Justice, Case C-162/96, [1998] ECR 1-3655, *Racke*.

envisaged by the Agreement throughout the territory of Yugoslavia constituted an essential condition for initiating and pursuing that cooperation.

"56. Regarding the second condition, it does not appear that, by holding in the second recital in the preamble to the disputed regulation that 'the pursuit of hostilities and their consequences on economic and trade relations, both between the republics of Yugoslavia and with the Community, constitute a radical change in the conditions under which the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia and its Protocols ... were concluded' and that 'they call into question the application of such Agreements and Protocols', the Council made a manifest error of assessment.

"57. While it is true, as Racke argues, that a certain volume of trade had to continue with Yugoslavia and that the Community could have continued to grant tariff concessions, the fact remains, as the Advocate General has pointed out in paragraph 93 of his Opinion, that application of the customary international law rules in question does not require an impossibility to perform obligations, and that there was no point in continuing to grant preferences, with a view to stimulating trade, in circumstances where Yugoslavia was breaking up.

"58. As for the question raised in the order for reference whether, having regard to article 65 of the Vienna Convention, it was permissible to proceed with the suspension of the Cooperation Agreement with no prior notification or waiting period, this Court observes that, in the joint statements of 5, 6 and 28 October 1991, the Community and the member States announced that they would adopt restrictive measures against those parties which did not observe the ceasefire agreement of 4 October 1991 which they had signed in the presence of the President of the Council and the President of the Conference on Yugoslavia; moreover, the Community had made known during the conclusion of that agreement that it would bring the Cooperation Agreement to an end in the event of the ceasefire not being observed (*Bulletin of the European Communities* 10-1991, paragraphs 1.4.6, 1.4.7 and 1.4.16).

"59. Even if such declarations do not satisfy the formal requirements laid down by article 65 of the Vienna Convention, it should be noted that the specific procedural requirements there laid down do not form part of customary international law.

"60. Examination of the first question has thus disclosed no factor of such a kind as to affect the validity of the suspending regulation."

On 25 November 1991, the Council terminated the Cooperation Agreement[10] with a six-month notice according to article 60 (2) of the Agreement.

(b) Certain conflicts in or between African, Caribbean and Pacific countries

Over decades, the European Community and its member States have entered into contractual relations with a number of African, Caribbean and Pacific States. Following on the so-called "Lomé I-IV" agreements, the current contractual relationship is laid down in the "African, Caribbean and Pacific-European Union

[10] Council decision 91/602/EEC of 25 November 1991, *Official Journal* 1991, L325, p. 23.

Partnership Agreement" signed in Cotonou on 23 June 2000 and revised in Luxembourg on 25 June 2005. According to article 9 (2) of the Agreement, fourth subparagraph, respect for human rights, democratic principles and the rule of law shall underpin the domestic and international policies of the parties and constitute the essential elements of the Agreement. Under article 11 (4) of the Agreement, "in situations of violent conflict the parties shall take all suitable action to prevent intensification of violence, to limit its territorial spread, and to facilitate a peaceful settlement of the existing disputes". Article 96 of the agreement provides for a specific consultation mechanism between the parties before either party can take appropriate measures if it considers that the other party has failed to fulfil an obligation stemming from the respect for human rights, democratic principles and the rule of law referred to in article 9 (2) of the Agreement. Such measures must be taken in accordance with international law and be proportional to the violation (article 96 (2) (c) of the Agreement).

While it is not the purpose of this communication to provide detailed comments on individual cases, it should be noted that the European Community and its member States may resort to the mechanism provided for under article 96 of the Agreement in order to suspend parts of the Agreement, as appropriate, also in reaction to the outbreak of non-international armed conflict in a partner country if and insofar as large-scale violations of human rights law occur as a consequence of that conflict.[11] The same is true if the army of a partner country commits serious human rights violations during an armed conflict with another country.[12] More details on Community practice in this area can be drawn from academic literature.[13]

3. Relationship of Community practice to the International Law Commission project

The European Commission would wish to relate the above limited practice to the draft articles of the International Law Commission project as proposed in the third report of the Special Rapporteur, Ian Brownlie (A/CN.4/578).

First, the constituent instrument of the European Community could theoretically fall within the scope of the present study as a treaty concluded between

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[11] Communication from the Commission to the Council and the European Parliament, Cooperation with African, Caribbean and Pacific countries involved in armed conflicts, Brussels, 19 May 1999, COM (1999) 240 final, p. 4, annex 1. The communication refers to article 366a of the Lomé IV Convention, which is the predecessor of article 96 of the Cotonou Agreements, as the legal basis for suspending the agreement "in case of serious violations of human rights or of other essential elements referred to in article 5 of the Lomé Convention as a consequence of armed conflicts, the European Community shall request consultations under the procedure referred to in article 366a, and may decide to suspend development cooperation or other aspects of the Convention with a given country".

[12] Communication from the Commission, note 11 above, p. 10.

[13] See, inter alia, B. Brandtner and A. Rosas, "Human rights and the external relations of the European Community: an analysis of doctrine and practice", *European Journal of International Law*, vol. 9 (1998), No. 3, pp. 468-490; E. Paasivirta, "Human rights and diplomacy: aspects to human rights clauses in the European Union's external agreements", in J. Petman and J. Klabbers (eds.), *Nordic Cosmopolitanism: Essays in International Law for M. Koskenniemi*, Leiden/Boston, 2003, p. 155 et seq.; F. Hoffmeister, "Les politiques de cooperation au developpement et d'assistance economique, technique et financiere et les droits de l'homme", in M. Candela Soriano (ed.), *Les droits de l'homme dans les politiques de l'Union europeenne*, Brussels, 2006, p. 255 et seq., esp. pp. 265-267.

member States (article 5 of the Vienna Convention on the Law of Treaties). However, as it contains specific provisions on the effect of armed conflict on the internal market, and given the specific legal nature of the Community, member States would apply these Community rules rather than general international law rules, as codified in the project.

Second, with regard to treaties to which the Community is a party, the Yugoslav and the African, Caribbean and Pacific cases seem to confirm the rule in draft article 3 (b) on non-automatic termination or suspension. The outbreak of armed conflict in the countries concerned did not automatically have an effect on the Community treaty. Rather such events constituted a ground for taking a decision to (partially) suspend or terminate the treaty.

Third, the Yugoslav case shows that both the Community legislator and the European Court of Justice regarded the outbreak of armed conflict as a fundamental change of circumstance within the meaning of article 62 of the Vienna Convention on the Law of Treaties. In that respect, Community practice would demonstrate the utility of draft article 13 (d).

Fourth, the African, Caribbean and Pacific cases evidence that the Community has a specific mechanism at its disposal to resort to the suspension of its treaty obligations facing armed conflict, if and insofar as large-scale violations of human rights occur during this conflict. This ground may fall under draft article 13 (a) — Suspension by common agreement of the parties — because the grounds and procedures for such suspension are previously agreed between the parties at the time when the treaty is concluded.

In the light of these points it appears that there is little need to broaden the scope of the study and to adapt the present draft to the specific situation of the European Community. Rather, as it does with respect to the Vienna Convention on the Law of Treaties of 1969, the Community would possibly be in a position to have recourse to the articles, even if their scope were not formally extended to international treaties concluded by international organizations.

B. International Maritime Organization

The International Maritime Organization (IMO) notes the recommendation contained in paragraph 4(l)(a)(ii) of the report of the Working Group of the International Law Commission (A/CN.4/L.718), to the effect that the question of the inclusion of treaties involving intergovernmental organizations be left in abeyance until a later stage of the Commission's work on the overall topic.

At this point in time IMO would like to offer the following comments and observations. First, IMO is the United Nations specialized agency charged with the competency to regulate the safety and security of navigation, the protection of the marine environment from shipping activities and the legal issues relating thereto. To this end, article 2(b) of the Convention on the International Maritime Organization, 1948, simply provides that the Organization shall "provide for the drafting of conventions, agreements, or other suitable instruments, and recommend these to Governments and to intergovernmental organizations, and convene such conferences as may be necessary". The IMO Convention does not contain any provisions about its operation or the activities of IMO in times of war, nor does it specify whether the

conventions (now numbering 51) and other numerous instruments of less than treaty status adopted under the auspices of IMO should continue to operate during times of war.

Secondly, in general, the treaty instruments adopted under the auspices of IMO, including those relating to the protection of the environment, apply to ships engaged in international commercial navigation. They do not, as a rule, apply to warships or other Government vessels operating, for the time being, for other non-commercial purposes, even in times of peace. This position is sometimes, but not always, reflected in the conventions adopted by IMO. For example, the International Convention for the Safety of Life at Sea, 1974, which is the main IMO convention dealing with the safety and security of ships, and which is adhered to by ships comprising over 98 per cent of the world's tonnage, contains no provisions at all relating either to its application to warships, or to the effects of armed conflicts. The presumption is that the Convention is not applicable to warships at all. The further question, i.e., whether this Convention would continue to apply to commercial vessels during periods of armed conflicts, and if so to what extent, would appear to depend therefore upon general principles of treaty law.

By comparison, article 3(3) of the International Convention for the Prevention of Pollution from Ships, as modified by the Protocol of 1978 relating thereto (MARPOL Convention), provides:

> "The present Convention shall not apply to any warship, naval auxiliary or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service. However, each Party shall ensure by the adoption of appropriate measures not impairing the operations or operational capabilities of such ships owned or operated by it, that such ships act in a manner consistent, so far as is reasonable and practicable, with the present Convention."

Another variation on this theme is the formulation contained in paragraphs 4 and 5 of article 4 of the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, 1996 (HNS Convention), which provide as follows:

> "4. Except as provided in paragraph 5, the provisions of this Convention shall not apply to warships, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on Government non-commercial service.
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> 5. A State Party may decide to apply this Convention to its warships or other vessels described in paragraph 4, in which case it shall notify the Secretary-General thereof specifying the terms and conditions of such application."

While the provisions contained in the MARPOL and HNS Conventions clearly apply to Governments during times of peace, again the Conventions are silent as to their continued operation during periods of armed conflict, even for commercial vessels.

It could be assumed that a situation of peace between the States party thereto is essential for their good operation, however, to our knowledge, the matter has never been raised or discussed at IMO. Given the multinational character of all of these

treaties, it is difficult to see how they could continue to operate fully in times of armed conflict, if they continue to operate at all.

There are several other treaties involving IMO, perhaps the most important of which are the Agreement between the International Maritime Organization and the Government of the United Kingdom of Great Britain and Northern Ireland Regarding the Headquarters of the Organization, 1968 and the Agreement between the International Maritime Organization and the Government of Sweden Regarding the World Maritime University, 1983. Other notable agreements are those with the United Nations and some of its bodies, as well as various agreements of cooperation with other international organizations. None of them deal with the effects of armed conflicts on their operation. While some of their provisions might be capable of application during periods of armed conflict, other provisions, if not the treaties in their entirety, would doubtless be suspended for the duration.

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